No. 78-1166

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS, DAVID W. JAMES, KENNETH WHITMAN, APPELLANTS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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INDEX

CITATIONS

Cases:

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The Solicitor General, on behalf of appellees, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-9a) is reported at 460 F. Supp. 56.

JURISDICTION

The judgment of the district court was entered on October 13, 1978 (J.S. App. 10a). The notice of appeal was filed on November 8, 1978 (J.S. App. 11a). On December 27, 1978, Mr. Justice Rehnquist extended

the time for docketing the appeal to January 26, 1979. The jurisdictional statement was filed on January 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

QUESTION PRESENTED

Whether 19 U.S.C. 1305(a), which prohibits the importation of written or printed materials "containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States," is unconstitutional on its face or as enforced by the United States Customs Service in this case.

STATEMENT

1. On Saturday, July 3, 1976, at approximately 8:00 p.m., at Los Angeles International Airport, Customs Inspector Larry Hoyle was asked by a British Airways cargo agent to examine three cartons of air cargo from England shipped to appellant Church of Scientology for entry into the United States (Hoyle Aff. 1-2). The three cartons were opened for his inspection by Michael Moore, a member of the Church who went to the airport to claim the shipment (Compl. para. 34).

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[1]As appellants note (J.S. 2 n.2), this action was commenced on July 7, 1976, before the repeal of 28 U.S.C. 2282 and 2284 by the Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, which provided in Section 7 that the repeal "shall not apply to any action commenced on or before" August 12, 1976.

Appellants sought an injunction against the enforcement of 19 U.S.C. 1305(a), asserting that it is unconstitutional. Therefore a three-judge court was properly convened. It was also proper for the three-judge court, in its discretion under its pendent jurisdiction, to determine appellants' additional claims that the administrative action taken was illegal under the Fourth Amendment (see J.S. App. 5a n.2). See *Turner* v. *Fouche*, 396 U.S. 346, 353-354 n.10 (1970); *Rosado* v. *Wyman*, 397 U.S. 397 (1970).

Hoyle found that the cartons contained documents.[2] Briefly scanning a few of the documents, Hoyle saw references to the "CIA," "Interpol," "de-bugging," "decoding machine," "sabotage" and other similar matters,[3] which led him to believe that the materials might be prohibited from entry into the United States (Tr. 44, 46). Alarmed by the apparent nature of these documents, Inspector Hoyle informed Moore that the shipment would have to be held for a more thorough inspection during normal business hours on Tuesday, July 6, 1976, the next business day.

On Sunday morning, July 4, 1976, Inspector Hoyle was again on overtime duty when he was approached outside the cargo office by two persons who attempted to persuade him to release the shipment (Hoyle Aff. 3). Because of this attempt, Inspector Hoyle became concerned about the security of the shipment. He called Agent Michael Peel of the Customs Service to discuss it (*ibid.*; Peel Aff. 1). At approximately noon, Inspector Hoyle gave the cartons to Agent Peel, who transported them to the Customs Facility at Terminal Island, California, for safekeeping (Hoyle Aff. 3; Peel Aff. 1-2). Agent Peel then began a thorough screening of the contents. On the following day, while the screening was in process, Agent Peel learned that in the early hours of July 5, 1976, the British Airways Cargo Office had been burgled and a fourth carton

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[2]Approval of shipments for entry is not a regular function of a customs inspector on overtime duty, but because this was a holiday weekend and the consignee would otherwise have had to wait until normal business hours on Tuesday, July 6, 1976, for inspection of the shipment, Hoyle agreed to examine it (Hoyle Aff. 2).

[3]Hoyle also read in one document the phrase: "He doesn't have a criminal record because they don't know that he killed his wife" (Hoyle Aff. 2; Tr. 44, 46). "Tr." refers to the transcript of the hearing in the district court.

had been stolen (*id.* at 2). This fourth carton was later found on a British Airways loading dock, open, with some of its contents removed, and was delivered to Agent Peel during the morning of July 7, 1976, (*ibid.*). Agent Peel discussed his inspection of the contents of all four cartons with his superiors in the Regional Customs Office, and several customs officials examined some of the documents (Peel Aff. 2-3; Tr. 84). During the afternoon of July 7, 1976, the District Director of Customs concluded that the importation of the materials contained in the cartons was not prohibited by the customs laws (Tr. 29, 68, 96-98).

2. Appellants filed this action on July 7 seeking injunctive relief and damages.[4] The complaint alleged, among other things, that 19 U.S.C. 1305(a), under which the defendants acted, "is constitutionally void on its face" under the First Amendment because "it is not limited in scope to advocacy directed to inciting or producing imminent lawless action or violence and likely to produce such action or violence" (Compl. para. 35(b). It also alleged that Section 1305(a) is an impermissible prior restraint of expression (*ibid.*) and that the warrantless seizure of the boxes violated the Fourth Amendment (*id.* at paras. 19, 32).[5]

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[4]On February 18, 1977, all damages claims were dismissed by appellants.

[5]On July 8, 1976, the district court entered a temporary restraining order, which enjoined the Customs Service from copying or disseminating any of the materials in the four cartons but permitted the Service to disclose the materials to the United States Attorney and to make "one copy of certain of the materials" as he finds appropriate "for criminal evidentiary purposes and/or for defense of damage claims" asserted by appellants. On July 13, 1976, the Customs Service delivered the four cartons to the United States Attorney's Office (Peel Aff. 3; Tr. 11, 67, 72, 104).

3. On October 13, 1978, the three-judge district court rejected all constitutional challenges to 19 U.S.C. 1305(a). The court declined to construe the "advocacy" provision to prohibit the importation of written materials that merely advocate violence as a political doctrine. The court construed the "advocacy" portion of the statute to incorporate the standards of *Brandenburg* v. *Ohio*, 395 U.S. 444, 449 (1969), which held that a state cannot proscribe advocacy of the use of force or of law violation " 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action ' " (J.S. App. 3a-4a). The court further held that the Customs Service's retention of the documents until it determined that they were importable did not constitute an "unconstitutional prior restraint of speech," because the thousands of pages of documents involved were detained for a "very short period" (*id.* at 4a-5a). Finally, the court held that the customs agents' warrantless reading of the documents was within the Customs Service's statutory authority to conduct "border searches" of materials coming into the United States from abroad (*id.* at 6a-7a). The court concluded that Inspector Hoyle's initial inspection was reasonable simply because the materials arrived from abroad, and that Hoyle's "reasonable suspicion" about the importability of the contents of the cartons provided the basis for the later more thorough inspection. The court determined that the actions of the customs officers were proper and in good faith, and that the detention of some documents as possible evidence of crimes other than customs violations was permissible under the "plain view doctrine" (*id.* at 7a-8a).

ARGUMENT

The decision of the district court is correct, and no substantial question is presented by the appeal.

1. Appellants contend that the warrantless search by customs officials violated the Fourth Amendment. The search, however, was a border search. It is essential for the effective enforcement of federal customs laws that customs officers be permitted to open cartons coming from abroad—without probable cause and without warrants—in order to determine whether their contents are lawfully imported. The reasonableness of such searches under the Fourth Amendment has long been recognized. As the Court observed in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971), "[c]ustoms officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country." In *United States* v. *Ramsey*, 431 U.S. 606, 618-620 (1977), the Court held that luggage and envelopes—whether arriving on the person of entrants or as cargo or mail—may be inspected at the border.[6] See also *United States* v. *12 200-Foot Reels of Film*, 413 U.S. 123, 125 (1973).

The cartons in this case were properly opened at the border. The initial inspection of the contents occurred during a routine examination, when appellants' representative opened the cargo for examination during the process of receiving the cargo. The materials were detained for further examination only after Inspector

[6]In *Ramsey* the Court held (431 U.S. at 619):

> Border searches, * * * from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We reaffirm it now.

Hoyle formed a genuine suspicion that importation of the materials might violate Section 1305(a).[7] Three days later, despite an intervening holiday, customs officials concluded that the documents were lawfully imported. This was a reasonable border search.

Appellants argue that *Ramsey* sustained the border search in that case only because the customs officials did not read the contents of the envelopes searched.[8] Appellants conclude that the search in the present case was invalid because the agents did read the contents of the carton. It is true that in discussing certain First Amendment claims in *Ramsey* the Court noted that a regulation prohibited customs officials from reading international mail without a warrant (see 19 C.F.R. 145.3). But those regulations do not pertain to cartons, and the Court did not base its Fourth Amendment holding that a valid border search had occurred on the existence of the regulations. To the contrary, the Court stated that "[t]he critical fact is that the envelopes cross[ed] the border and enter[ed] this country * * *. It is their entry into this country * * * that makes a resulting search 'reasonable'." 431 U.S. at 620. That the cartons of air cargo involved in this case crossed the border was by itself enough to subject them to the limited detention and examination that occurred in this case. And whatever special rules may apply to inspections of envelopes do not apply to inspections of cartons.[9]

[7]Although appellants contend that the Customs officials engaged in a "general law enforcement search" (J.S. 18-19), appellants concede that customs officials conducted the search for violations at 19 U.S.C. 1305 (J.S. 19). In any event, the district court found that the initial search was not a pretext for obtaining evidence against the Church of Scientology in other proceedings (J.S. App. 8a).

[8]The envelopes in *Ramsey* contained heroin but no writings.

[9]The principal dispute in *Ramsey* was whether the traditional rules, which unquestionably had allowed thorough searches of

2. Appellants contended below that Section 1305(a) violates the First Amendment because it seems to prohibit importation of written materials that merely advocate the overthrow of the government and thus violated the holding of *Brandenburg* v. *Ohio*, 395 U.S. 444, 494 (1969), that a state cannot proscribe advocacy of the use of force "except where such advocacy is directed to incit[ement] or producing imminent lawless action and is likely to incite or produce such action." The district court avoided the constitutional issue by construing Section 1305(a) to proscribe only those materials that constitutionally may be proscribed under the *Brandenburg* test.

Appellants now contend that the district court erred in adopting a construction that gave them the very result they wanted—a rule under which documents

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packages ariving from abroad, also allowed searches of envelopes sent as letter-class mail. It was common ground among the parties and the Justices that cartons, luggage and the like could be opened without cause. Respondents in *Ramsey* simply argued that envelopes should be treated differently because they were especially likely to contain correspondence. The Court rejected that argument, and the argument of appellants here must fail as a result.

Appellants rely on 19 U.S.C. 482, which gives Customs officials authority to open any "trunk or envelope" that they have "reasonable cause to suspect" contains dutiable articles or contraband, as a limit on the power of officials to open cartons at the border (J.S. 16). The statute cannot be so employed, for several reasons. First, the Court interpreted that "reasonable cause" language in *Ramsey* as meaning only that Customs officials must have cause to suspect that an envelope contains something other than correspondence. In the present case it was clear that the cartons had more than routine personal correspondence. Second, nothing in Section 482 purports to restrict authority given by other statutes. The opening here was authorized by 19 U.S.C. 1582, which authorizes the Secretary of the Treasury to "prescribe regulations for the search of persons and baggage * * * coming into the United States from foreign countries * * *." Section 1582 does not condition the right to search on the presence of particularized suspicion.

advocating violence may be imported. It is hard to understand the cause of their complaint; they were not aggrieved. The district court followed the course charted by the Court for Section 1305(a) in *Thirty-Seven Photographs*. In that case Section 1305(a), as applied to the importation of allegedly obscene materials, was challenged for failure to comply with the prompt-hearing requirements of *Freedman* v. *Maryland*, 380 U.S. 51 (1965). The Court avoided the constitutional issue by construing Section 1305(a) to incorporate the prompt-hearing requirements, which the Court observed were not inconsistent with the purpose of Section 1305(a). The Court also observed that 19 U.S.C. 1652 provided that "[i]f any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby." This provision is a direction to the courts not to invalidate Section 1305(a) if some narrow, saving construction could be drawn.

In the present case, the construction of Section 1305(a) adopted by the district court is not inconsistent with the purpose of the statute.[10] Because the district

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[10]Appellants contend that Section 1305(a), as amended by the Tariff Act of 1930, cannot logically be read to incorporate the *Brandenburg* standards because its language is modeled on an earlier postal statute (now codified as 18 U.S.C. 1717) that was intended by Congress, and has been construed by the Court and the Second Circuit, to "embrace abstract advocacy" (J.S. 21-22). They claim that *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407 (1921), and *Masses Publishing Co.* v. *Patten*, 246 F. 24 (2d Cir. 1917), upheld the Postmaster General's action under the *postal* statute barring from the mails written material "merely criticizing laws and government policy, on the ground that such criticism *impliedly* advocated civil disobedience" (J.S. 22). Therefore, appellants reason, Section 1305(a) cannot be construed as the district court did. But this argument overlooks the critical fact that the postal statute was a

court's construction does not conflict with any other judicial construction of Section 1305(a) (see J.S. 20), and because the construction is generally favorable to appellants, they have no grievance that calls for reversal.[11]

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part of the Espionage Acts of 1917 (40 Stat. 217) and was construed accordingly. The Postmaster's barring of certain publications from the mails in *Burleson* was sustained by this Court on the ground that the publications conveyed "false reports and false statements with intent to promote the success of the enemies of the United States, and that they constituted a willfull attempt to cause disloyalty and refusal of duty in the military and naval forces and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law" (255 U.S. at 414). Similarly, in *Masses* the Second Circuit construed the statute as a constitutionally permissible measure intended to close the United States mails to letters or literature in furtherance of acts prohibited elsewhere in the Espionage Acts (246 F. 2d at 27). These decisions rest on the principle enunciated in *Schenck* v. *United States*, 249 U.S. 47, 52 (1919):

> When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

See also *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). The customs statutes do not share this foundation and are not principally designed to guard against treason or to preserve morale in time of war. The purposes and history of Section 1305(a) thus do not unequivocally forbid the district court's construction.

[11]It is open to question, however, whether constitutional principles required the district court to construe the statute as it did. *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), establishes that Congress or the Executive Branch can prohibit the "import" of persons bearing unwelcome ideas, even though the ideas themselves would be entitled to constitutional protection within the United States. Similarly, it may be that Congress can require written materials to be turned away at the border, even if possession of those materials within the United States could not constitutionally be made a crime. If the Court were to set this case for plenary review, appellees could assert this argument in support of the district court's judgment. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

3. Appellants argue that Section 1305(a) offends the First Amendment because it authorizes a prior restraint on written communications received from overseas. We assume for purposes of argument that the First Amendment prohibits an unduly long seizure of written communications of the type sent to appellants and that, in a proper case, the Court might impose time limitations on the advocacy provisions of Section 1305(a) similar to the time limitations imposed on the obscenity provisions of Section 1305(a) in *Thirty-Seven Photographs*. Nonetheless, that issue is not presented by this case.

Appellants' voluminous documents arrived on the evening of July 3, 1976. Despite the intervening holiday the documents were examined promptly, and by July 7 the Customs Service had determined that the cartons could be lawfully imported. Such a "very short delay," as the district court observed (J.S. App. 4a-5a), is well within the 14-day and the 60-day time limits imposed by *Freedman* and *Thirty-Seven Photographs*. The issue appellants would like to present should be decided only if Customs officials ever use Section 1305(a) to refuse importation of "mere advocacy" materials or undue delay in making a determination that such materials are importable. In such concrete circumstances, the competing considerations concerning the wisdom of time limits and the respective roles of administrative and judicial determinations would be much better illuminated than in the abstract circumstances of this case.[12]

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[12]Appellants cite *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), for the proposition that "a day or two" can be critical where speech is concerned. We agree that in the context of that case—where an *ex parte* court order banned a political rally scheduled for the next day—a day or two was critical. Here, however, appellants do not suggest that a day or two delay in receiving their overseas air cargo threatened any

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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political rally or equivalent speech interest. In fact, as we observed (see note 2, *supra*), appellants normally would not have received their cargo until July 6, 1976, given its arrival on the evening of July 3. Inspector Hoyle was not required to examine the cartons on July 3; he did so only as an accomodation to appellants.

DOJ-1979-04